In the High Court of Judicature at Madras

Dated: 21/03/2003

Coram

The Honourable Mr.Justice R.Jayasimha Babu
and
The Honourable Mr.Justice K.Raviraja Pandian

Tax Case No.53 of 1999

Commissioner of Income-tax,
Madurai. ..... Applicant

-Vs-

M/s. Southern Roadways Ltd.,
Lakshmi Building,
Kochadai, Madurai 625 016. ..... Respondent

Reference made under Section 256(1) of the Income-tax Act, 1961 by the Income-tax Appellate Tribunal, B Bench, Madras, in RA.No.116/Mds/9 7 in ITAs No.1503 and 1504/M/86 for the assessment year 1972-73.

!For Applicant : Mrs.Pushya Sitaraman,
Sr. Standing Counsel for IT Dept.

For Respondent : Mr.S.A. Balasubramanian

:JUDGMENT

(Judgment of the Court was delivered by
R.Jayasimha Babu, J.)

The assessment year is 1972-73. The questions referred are :
"1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in admitting an additional ground raised by the assessee questioning the CIT (A)'s finding that profits as per Section 41(2) on sale of buses and other assets are properly assessable in the assessment year 1973-74?
2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in holding that the CIT(A)'s findings that the profits under Section 41(2) are assessable in the assessment year 1973-74 and not in assessment year 1972-73 are only incidental findings and are not legally binding on the Assessing Officer?
3. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in deleting Rs.55,21,856/- being profit u/s.41(2) from the total income for the assessment year 1972-7 3?"

2. The assessee was running a passenger bus service and owned 346 busses, 16 other vehicles, lands, buildings premises, spare parts, machinery, etc., all of which were acquired by the State under Section 3 of the Tamil Nadu Fleet Operators Stage Carriages (Acquisition) Act, 1971 (Tamil Nadu Act.XXXVII of 1971). That Act came into force on 0 7.12.1971. The assets of the assessee relating to it's bus transport system were taken over on 17.01.1972.

3. On the 21st of March 1972 the Government issued an order in which it was, inter alia, stated thus:
The bus transport system of Southern Roadways Private Limited, Madurai, has been taken over by the Government on the 17th January, 1972 and transferred to the Pandyan Roadways Corporation Limited, Madurai on the same date. The Government have decided to pay to the Southern Roadways Private Limited, part compensation of Rs.51.50 lakhs (Rupees fifty one lakhs and fifty thousands) in cash in two equal instalments in March and April 1972, for their properties which have been taken over. Accordingly, the Government direct that a sum of Rs.25.75 lakhs (Rupees twenty five lakhs and seventy five thousands) be paid immediately in March 1972 to Southern Roadways Private Limited, Madurai, towards a portion of the part compensation and that the balance of the part compensation amounting to Rs.25.75 lakhs (Rupees twenty five lakhs and seventy five thousands) be paid to the firm in April 1972."
4. Some months later, the total amount of compensation payable to the assessee was determined at Rs.1,25,42,741.66 as the result of negotiation with the assessee. From that amount gratuity liability of Rs.30,00,000/- and leave liability of Rs.3,87,684.41 were deducted. In that notification of 07.09.1972 after referring to those figures it was stated "A part payment of compensation of Rs.51,50,000/- has been made to the operator in G.O. Ms. No.249 Transport, dated 21.03.1972. The Secretaries' Committee has recommended that the operator is entitled to be paid the balance of Rs.40,05,057.25 in full and final settlement of all his claims for all properties taken over under Transport Department's Notification....."

5. For the assessment year 1972-73 the sum of Rs.51.50 lakhs was treated as the income of the assessee in that year by the assessing officer who regarded this sum as a balancing charge and liable to be brought to tax under Section 41(2) of the Income-tax Act, as this sum was received for the building, machinery and plant which had been owned by the assessee and on which it had received depreciation and the amount received was in excess of written down value.
6. The assessee contended before the assessing officer that the amount received by it as compensation for the compulsory acquisition of it's assets could not be regarded as part of it's income. That contention was rightly rejected by the assessing officer who referred to the definition of the word "sold" in the Explanation (2) to Section 4 1(4) and which definition made it abundantly clear that the transfer by way of exchange or a compulsory acquisition under any law was, for the purpose of this section, to be treated as a sale.

7. It was also contended by the assessee that this amount can only be included for assessment in the next assessment year, as the total amount of

compensation payable was determined only under the notification of 07.09.1972. The assessing officer held that as the money had been paid by the Government as compensation, that amount was includible in the assessment year as part of compensation for the assets acquired from the assessee, and that as to the amount had become due to the assessee in terms of the Government Order of 21.03.1972, the same was required to be included in the assessment for the assessment year 1972-73.

8. On appeal by the assessee, the Commissioner held that this amount is not includible in the assessment for the assessment year 1972-73 year as the total amount due had not been finally determined under the Notification of 21.03.1972, but was only determined under the Notification of 07.09.1972. He also in the course of his order held that this amount is to be included in the assessment for the assessment year 1973-74.

9. Appeals were filed by the assessee as also by the revenue against the order of the Commissioner. The assessee's contention was that no tax could be levied as Section 41(2) had no application to the facts of the assessee's case. An additional ground was subsequently raised during the pendency of the appeal with regard to the direction given by the Commissioner in the course of his order that this amount be brought to tax in the assessment year 1973-74. The Tribunal while holding that the amount was liable to be treated as income of the assessee under Section 41(2) held that the Commissioner had acted beyond his jurisdiction in directing that the amount be included for the assessment year 1973-74. The Tribunal rejecting the revenue's appeal held that Rs.51.50 lakhs could not be brought to tax in this year as in it's view the amount had not become due.

10. Of the three questions before us the first two concern the directions given by the Commissioner to include this amount in the assessment for the assessment year 1973-74. The answer to those questions are really academic, having regard to the statutory provision in Section 153(3)(ii) and Explanation (2) under the proviso thereto. The effect of those provisions is to expand the period of limitation to permit the revenue to bring to tax the amounts which are deleted or reduced from the assessment made for any year and which are deleted or reduced as not properly falling within the scope of the proceedings for that year, by reason of an order made in appeal or other proceedings under Sections 250, 254, 260, 262, 263 or 264 of the Income-tax Act, 1961. The assessment of the income so excluded may be made for another assessment year for the purpose of Section 150 as also for the purpose of section 153 as the assessment is deemed to be one made in consequence of or to give effect to any finding or direction contained in the order made under the aforementioned sections.

11. Section 153(3)(ii) reads thus:
Section 153:- Time limit for completion of assessments and reassessments.
(1) ...
(2) ...
(3) The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may,

subject to the provisions of sub-section (2A)] be completed at any time:-
(i) .....
(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 2 60, 262, 263, or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act.
Explanation 2 to the proviso thereunder reads thus:
"Explanation 2 :- Where by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order."

12. Thus, the legal effect of the order of the Commissioner directing the deletion of this amount from the scope of the assessment for this assessment year would be the same, whether or not a direction for including this amount in the succeeding assessment year is included in that appellate order.

13. Moreover, it is within the jurisdiction of the Tribunal to permit the parties before it to raise additional grounds if the additional grounds can be considered and decided on the basis of the materials already on record. Whether or not to allow additional grounds to be raised is a matter of sound discretion of the Tribunal. The Tribunal had the jurisdiction and had exercised it's discretion properly in permitting the assessee to raise the additional ground. We answer the first question in favour of the assessee.

14. No answer need be recorded for the second question having regard to Section 153 of the Act. That question is returned unanswered.

15. With regard to the third question, it was submitted by the learned counsel for the assessee that in the order of assessment the assessing officer had not regarded the sum of Rs.51.50 lakhs as part of compensation, and therefore it is not permissible for the revenue now to say that that amount only constituted a part of the compensation and that such a part was includible in the assessment for this year. Counsel in this context referred to the decision of Supreme Court in the case of Ravindranathan Nair vs. Commissioner of Income-tax, (2001) 247 ITR 178 and of this Court in the case of Commissioner of Income-tax vs. India Pistons Repco Ltd., (1999) 240 ITR 59. Here no question of fact is in dispute. The order of the Income-tax Officer itself shows that he was aware of the fact that the compensation

determined was at Rs.1,25,42,741.66 from which certain sums were to be deducted and that the amount which he had regarded as being includible in the assessment for this assessment year was only Rs.51.50 lakhs.

16. It was also not the case of the assessee before the assessing

officer that this amount should not be included in the assessment on the ground that it represents only a part and is not a whole of the amount that would be payable in terms of the Tamil Nadu Fleet Operators Stage Carriages (Acquisition) Act, 1971. The facts set out in the orders of the authorities below as also the Tribunal make it abundantly clear that every one of the authorities was conscious of the fact that the amount of Rs.51.50 lakhs was only part of the compensation and all the balance amounts had been paid in September 1972. Even the very order under which this amount is directed to be paid refers to the sum as part compensation and the first instalment of that compensation has been described as part of the part compensation.

17. Learned Senior Standing Counsel for the revenue placing strong reliance upon the decision of the apex Court in the case of Commissioner of Income-tax vs. United Provinces Electric Supply Company, (2000) 244 ITR 764 submitted that on the facts of this case, the amount directed to be paid to the assessee under the Government Order of 21st day of March, 1972 is required to be regarded as amount which was due to the assessee that amount having become payable earlier on the acquisition of it's assets, and that fact would suffice to bring that amount to tax in the assessment for this year even though further amount was payable to the assessee and was, in fact, paid in the subsequent assessment year.

18. The material word 'due' which require consideration is to be found in Section 41(2) of the Act:
S.41 Profits chargeable to tax:
(1) .....
(2) Where any building, machinery, plant or furniture,--
(a) which is owned by the assessee;
(b) in respect of which depreciation is claimed under clause (i) of sub-section (1) of section 32; and
(c) which was or has been used for the purposes of business,
is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be together with the amount of scrap value, if any, exceeds the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to income-tax as income of the business of the previous year in which the moneys payable for the building machinery, plant or furniture became due.

The word "due" has several shades of meaning. As explained in Words and Phrases Permanent Edition Volume XIIIA, that word is used to refer to the debt or obligation which has become immediately payable. It is also used to refer to simple indebtedness without reference time of payment.

19. Though the amount becomes payable when the asset is transferred in the absence of any agreement to the contrary, and the amount also becomes 'due' in the sense that that amount is owed, the determination of the amount if not made at the time of the transfer, and is made subsequently, the amount can be said to become due at that subsequent point of time when the amount payable is determined. S.41(2) does not equate 'payable' with 'due'.

20. A three Bench of the Apex Court in the case of Central India Electric Supply Company Vs. Commissioner of Income-tax (247 I.T.R.54), upheld the decision of the Madhya Pradesh High Court which had held that the word "due" in Section 41(2) of the Act should be understood as the time at which the person entitled to the monies could enforce the payment of the same which had by then been determined. The Apex Court held that when the Arbitrator's Award was made the rule of the Court, the amount was to be regarded as having become due in that year, as the decree so made become enforceable immediately after it was made a rule of the Court. The judgment of the Madhya Pradesh

High Court has been approved by another two Judge Bench of the Apex Court also in the case of Commissioner of Income-tax Vs. United Provinces Electricity Supply Company (244 I.T.R.764).

21. Though the subsequent enhancement of the amount initially determined may take place in a year subsequent to the year in which the amount was initially determined, the year which enhancement was made has not been regarded as the year in which the amount became due. The Court has thus recognised the possibility of the amount to be brought to tax under Section 41(2) of the Act being so brought to tax in two different assessment years, the amount initially determined in one year and the amount of enhancement as a result of further proceedings, in a later year.

22. The determination of the amount is a pre-condition for bringing the amount to tax. CIT vs. Shivarudrappa, 200 ITR 1, was a case where the amount determined as the compensation for the acquisition of buses was statutorily required to be disbursed in instalments. The Karnataka High Court held that it is only the amount of the instalment due in the relevant previous year that was assessable, as the assessee had no right to enforce the payment of subsequent instalments even before they became due for payment.

23. In this case, the amount payable to the assessee for the compulsory acquisition of it's buses and other assets relating to the passenger transport buses, was required to be determined by way of agreement, and in the event of agreement not being reached by reference to arbitration. The assets were taken over in the month of January, 1 972. In March of that year, when the Government decided to pay a part of the compensation payable for the acquisition of the assessee's assets, there was no determination of the total amount payable, as such determination could only be the result of an agreement and no such agreement had been reached at that point of time, neither party having sought arbitration. What was disbursed by the Government, therefore, was an amount which was to be adjusted against the amount which was required to be determined either by way of an agreement or by recourse to arbitration. The parties did reach an agreement some months later during the assessment year 1973-74, and it was at that point of time there was a determination of the amount payable for the assets which had been taken over. The amount, therefore, is to be regarded as having become due at that point of time when the agreement was reached.

24. The term "due" as emphasised in the aforementioned decisions

carries with it the implication that the amount which can be said to be due is an amount the recovery of which can be enforced and that amount is an ascertained sum. Such ascertainment having been made in this case in the succeeding assessment year, it is in that year that the amount is to be brought to tax. The fact that a part of that amount had been disbursed in the earlier year would not make that amount immune from taxation in the succeeding year, nor would that amount become liable for taxation in the year in which it was paid. The terms used in Section 41(2) of the Act do not require that the amount should have been received. The emphasis is on the point of time at which the amount became due and it is that point of time alone which is relevant for the purpose of determining the year in which such amount should be brought to tax.

25. Though as pointed out in the decision of the Apex Court in the case of United Provinces Electricity Supply Company (244 I.T.R.764) (Supra), the word "finally" is not used in Section 41(2) of the Act, nevertheless, there must be initial determi on which may subsequently be modified by reason of other subsequent proceedings. But the initial determination is a pre-requisite for regarding that amount as having become due.

26. The order made by the Government in March 1972 is an unilateral order by which it came forward to disburse a part of the compensation which it was required to pay and the precise quantum of which had not as yet been ascertained either by agreement or by recourse to arbitration. Such voluntary disbursement of part of the unascertained amount which the Government had to pay for the assets taken over is, therefore, not capable of being regarded as an amount which had become due and payable as the result of an agreement. The fact that the assessee received the amount so disbursed by itself would not be sufficient to hold that the amount that was received was the result of an agreement between the parties, in order to bring it within the ambit of Section 41(2) of the Act.

27. We, therefore, answer the last question in favour of the assessee, and against the Revenue.

Index : Yes
Web : Yes

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1. The Assistant Registrar,
Income-tax Appellate Tribunal,
Rajaji Bhavan, III Floor, Besant Nagar,
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3. The Commissioner of Income-tax, Madurai

4. The Appellate Assistant Commissioner
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5. The Income-tax Officer,
Company Circle, Madurai